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Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 2-7

HARTFORD-EMPIRE COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

REPLY OF APPELLANTS OWENS-ILLINOIS GLASS COMPANY AND ITS ASSOCIATED INDIVIDUAL APPELLANTS TO PETITION OF THE UNITED STATES FOR CLARIFICATION OR RECONSIDERATION

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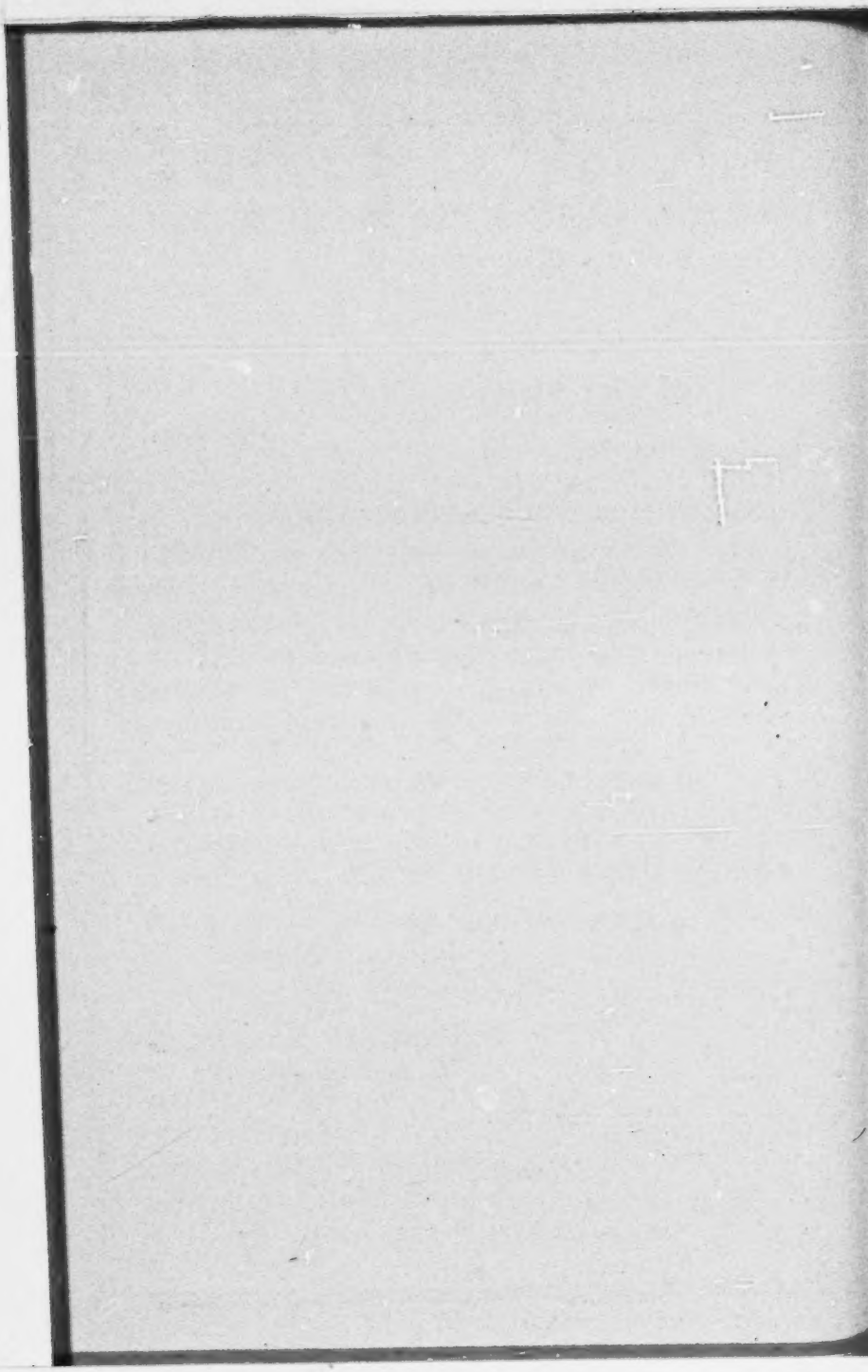
February 9, 1945.



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Owens agrees with the Department that this Court's opinion may raise certain questions of detail as to the intended modifications of the judgment below. However, Owens believes that any ambiguity is more apparent than real, and that the District Court will have no serious difficulty in working out modifications appropriate to carry out this Court's obvious intent.

Department Point I. Owens agrees that release to Hartford of the earmarked royalties and disposition of the impounded funds should be upon such a basis as not to discriminate, either theortically or in practical application, between any of the container or non-container manufacturers, whether as between defendants themselves or as between the defendants as a class and non-defendants. But Owens

believes the details of eliminating any discrimination can be left to the District Court.

Department Point II. Owens agrees that there should not be a complete lapse pending the entry of the modified judgment, but it believes that the fears of the Department on this score are groundless. Obviously, the intent of this Court was to continue the stay already entered below, pending the substitution of the modified judgment.

The Department's suggestion that all the provisions of the original judgment should continue until the entry of the new judgment is clearly impractical and inequitable, for it would make applicable provisions of the judgment which this Court has held to be without foundation.

Department Point III. Owens agrees that this Court intended the modified judgment to extend to all machinery for the manufacture of glassware, and that the omission of the term "suction machines" in connection with this Court's specification of "feeders, formers, stackers and lehrs" was not intended to exclude suction machines from the application of the modified judgment.

Department Point IV. Owens takes no position on this point.

Department Points V, VI and VII. Owens agrees that compulsory licensing should operate without discrimination, either theoretical or practical, as between any of the defendants. Hence, Owens agrees that each defendant should be required to license all applicants to make, or have made, and use feeders, formers, stackers, lehrs and suction machines, or parts or improvements thereof, under all its patents, regardless of whether the apparatus intended so to be made or used is now being manufactured or leased by it.

The licenses compelled, however, should be merely for the field of glassware machinery, parts or improvements, and should not be general licenses to use, for purposes other than manufacture of glassware, inventions which may have some use in the glassware field.

Owens does not believe that it is feasible to provide for the compulsory licensing of single patents and the determination of royalties in connection therewith. On this point, it agrees with the position Hartford is taking in the memorandum filed on its behalf. The licenses should be available to prospective licensees in five packages, covering in respect of each licensor (1) feeders, (2) formers, (3) stackers, (4) lehrs and (5) suction machines, and licensees should be under no obligation to buy services which they do not desire and use.

Owens assumes that this Court's opinion requires that the royalties under such package licenses should, in the case of each licensor, be "reasonable", and it does not find anything in this Court's opinion to justify any contrary contention.

Again Owens believes that in these questions of detail this Court's opinion furnishes an adequate guide to the District Court.

Department Point VIII. Owens takes no position with respect to the Department's suggestion that it may at some future time desire to urge dissolution of Hartford.

This position of the Department, however, accentuates the importance that the power to be reserved by the District Court to modify the judgment should not be a unilateral power exercisable only on behalf of the Government. The modified judgment should express the concession several times made by the Department during the course of the

arguments in this Court that the defendants shall be free to apply to the District Court, and the District Court shall be free, to terminate any provision of the judgment which is working undue hardship upon a defendant and which can be established to be unnecessary in the light of the facts at the time of such application.

This is of particular importance with relation to licensing under future inventions. This Court's opinion pointed out (slipsheet, p. 21) that compulsory licensing of future patents would deprive the defendants of options patent owners have always enjoyed, and would be contrary to a long course of legislative history extending back to as early as 1877. However, the opinion seems thereafter to require certain licenses under future patents. Owens believes this provision for compulsory licensing under future patents must be taken in the light of the concession of the Department (Brief on Reargument, p. 142) that such a requirement should be temporary only, terminable as to each defendant when no longer appropriate to it. Owens, therefore, assumes that in the revision of Paragraph 24(b) both the Department and the District Court will agree that a proviso should be added that licensing under future patents shall be required as to any defendant only until, on application by it, the Court shall find such defendant has fully complied with all the provisions of the judgment affecting it, and is not illegally restraining or monopolizing trade or commerce in machinery, or in patents covering machinery, for the manufacture of glassware.

Similarly, Owens assumes that the failure of this Court's opinion to provide specifically for clarification of Paragraphs 53 and 54 of the original judgment was in the light of the Department's assertion that these paragraphs

were intended to apply only to concerted action between the defendants, and were not to apply to such ordinary transactions between a defendant and a third party as the settlement of a routine patent interference.

If, therefore, this Court should determine to hand down a supplemental opinion clarifying any of the points raised by the Department, Owens urges that the opinion make clear that the original judgment is also to be modified to make effective the many concessions and limited constructions taken by the Department in its briefs and on argument in this Court.

Respectfully submitted,

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New York City, February 9, 1945.